75-1480

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-2365

ROBERT C. BANNERT,
Petitioner,

vs.

AMERICAN CAN COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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JURISDICTION

Petitioner Robert C. Bannert seeks review of an October 23, 1975 decision of the Court of Appeals reported at 525 F2d 104.

A rehearing was denied on January 14, 1976.

Section 1254(1) of Title 28 confers jurisdiction upon this Court.*

THE QUESTION

Since *Erie* v *Tompkins*[1] and *United States* v *Schooner Peggy*[2] require reversal by the United States Supreme Court of a United States Court of Appeals decision conflicting with a subsequent decision of the highest state court on a controlling issue of state law while the federal case remains *sub judice*, may a United States Court of Appeals decide a novel state law question when the very question has been argued and is awaiting decision in the highest state court?

Petitioner answers "No".
The United States Court of Appeals answered "Yes".

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* "Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon petition by any party to any civil or criminal case, before or after rendition of judgment or decree;"

28 USC 1254(1).

[1] 304 US 64 (1938).

[2] 5 US (1 Cranch) 103 (1801).

STATEMENT OF THE CASE

In this diversity of citizenship case, the District Court for the Eastern District of Michigan *held* that Respondent-Defendant American Can Company acted unconscionably when it terminated Petitioner-Plaintiff Robert C. Bannert's $338.97 monthly pension benefit (resulting from the Can Company's contributions to its Retirement Plan For Salaried Employees) on account of Bannert's post-retirement competitive employment.

In the absence of Michigan authorities in point, the District Court relied upon non-Michigan, common law decisions *holding* such terminations of pension benefits, on account of post-retirement competition, unenforceable.[3]

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[3] The District Court cited a number of decisions collected in Annotation, *Validity, Construction and Effect of Provision Forfeiting Or Suspending Benefits In Event of Competitive Employment As Part of Retirement or Pension Plan*, 18 ALR3d 1246 (1968), including the decision of the Supreme Court of Iowa in *Van Hosen* v *Bankers Trust Co.*, 200 NW2d 504 (Iowa 1972), where the Court observed:

> [A]n employer's basic purpose in creating an employee pension program is to encourage loyal and productive career service on the part of all possible participants.
>
> • • •
>
> But there are counterbalancing factors which must also be evaluated.
>
> Under existing economic conditions, a person accepting employment will generally evaluate both take-home pay and fringe benefits. In any event, when a career employee retires, either voluntarily or involuntarily, he or she often experiences a traumatic economic change.
>
> • • •
>
> [W]hile engaged in working for a second employer, such pension rights as may have been acquired during service with a prior employer are, to the retiree, relatively insignificant. But when retirement from any subsequent employment occurs the result can be chaotic, absent restoration of any pension rights acquired through extended service with a prior employer. The harshness of such a situation is self-evident.

(continued on next page)

The Court of Appeals *reversed* on the ground that Michigan decisions, not directly in point,

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(continued from preceding page)

> Moreover, private pension plans have a humanitarian purpose in that, like employment security, they extend to those benefited some degree of financial independence at a time when earning ability and related income may be impaired or ended (citation omitted). It is in turn evident these programs have become increasingly vital to our socioeconomic community welfare. By the same token society today has a material interest in the orderly development and administration of all pension plans, public or private (citation omitted).
>
> [T]he infinite forefeiture and termination of all pension rights, . . . acquired by plaintiff through prior affiliation with defendant bank, merely by accepting employment with a competing institution, imposes an unjust and incivic penalty on plaintiff at the same time disproportionately benefitting these defendants.
>
> We now hold that such a pension and termination provision, being so unreasonable as to be in violation of public policy, is accordingly unenforceable.

Subsequent to the decision of the District Court, the Supreme Court of South Carolina, in the course of *holding* that such a termination provision constitutes an unreasonable and, therefore, unenforceable restraint, drew upon the federal Retirement Income Security Act of 1974 (29 USC 1001 *et seq.*) as a source of the development of the common law of South Carolina:

> Congress in 1974 passed a comprehensive Pension Reform Act. While it was not effective at the time of the institution of this action and thus not applicable, it is of great assistance to us. After numerous public hearings, one of the conclusions reached by Congress was that forfeitability of pension and profit sharing retirement income interfered 'with the mobility of labor, to the detriment of the economy.' U.S. Code Cong. & Admin. News, Vol. 8, p. 258 (1974). Accordingly, under the Act, no longer will a vested benefit be forfeitable 'because the employee later went to work for a competitor or in some other way was considered "disloyal" to the employer.' Id. p. 344. Congress noted that it was in the public interest to have a portable working class, unimpeded by forfeiture provisions.

Almers v *South Carolina National Bank of Charleston, et al.*, 265 SC 48, 57; 217 SE2d 135, 139 (1975).

> "lead us to conclude that the Michigan courts would not find forfeiture unconscionable or unreasonable here.[4]
>
> "We are aware that the same issue herein presented is pending before the Michigan Supreme Court in *Woodward, et al.* v *Cadillac Overall Supply Co.*, No. 56015, argued June 4, 1975."[5]

The Court of Appeals also acknowledged that

> "Michigan law was applied by the District Judge and neither party on appeal argued that any other law should be applied."[6]

Thus, the Court of Appeals *reversed* the District Court on an issue of state law on which the highest court has heard oral argument and is in the process of rendering a decision.

ARGUMENT

This Court has ruled that, where a case is *sub judice* before the United States Court of Appeals or the United States Supreme Court, a decision of the highest state court on a controlling state law question, rendered while the federal case is *sub judice* before the United States Court of Appeals or the United States Supreme Court, mandates reversal of any prior contrary decision on the state law question in the pending federal case:

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[4] *Bannert* v *American Can Company*, 525 F2d 104, 110 (6th Cir. 1975), reprinted in the Appendix, Page 36.

[5] 525 F2d 104, 111, n. 6, reprinted in the Appendix, Page 36.

[6] 525 F2d 104, 109 n. 5., reprinted in the Appendix, Page 33.

'[I]f subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied.'

• • •

"[T]he principle quoted has found acceptance in a variety of situations. • • • *Sioux County* v *National Surety Co.* [276 US 238, 240 (1927) **reversing a federal court of appeals decision conflicting with a subsequent decision of the highest state court on a controlling state law question**].

"While cases were pending here on review, this Court has acted to give opportunity for the application by the lower courts of statutes enacted after their judgments or decrees. It has vacated judgments of state courts because of contrary intervening decisions, and has accepted jurisdiction by virtue of statutes enacted after cases were pending before it. (citations omitted.) • • • Intervening and conflicting decisions will thus cause the reversal of judgments which were correct when entered.

"[W]e are of the view that, until such time as a case is no longer *sub judice,* the duty rests upon federal courts to apply state law under the Rules of Decision statute in accordance with the then controlling decision of the highest state court. (citations omitted.) Any other conclusion would but perpetuate the confusion and injustices from inconsistent federal and state interpretations of state law."[7]

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[7] *Vandenbark* v *Owens-Illinois Glass Co.*, 311 US 538, 541, 542, 543 (1941).

The Court of Appeals denied a Motion filed by Bannert, prior to the oral argument in the Court of Appeals, to defer further proceedings in this case pending the disposition of the controlling issue of state law by the Michigan Supreme Court in *Woodward*.. Appendix, Pages 21, 23.

There was and is no reason for an immediate disposition of this appeal since the Opinion and Judgment of the District Court require no present action by the Can Company. Under the Opinion and Judgment of the District Court, the Can Company is not directed to make any payments to Bannert until after he leaves his current competitive employment. Appendix, Pages 19-20.

Since the decision of the Michigan Supreme Court on the state law issue should control here, the Court of Appeals should have held this case in abeyance pending the decision of the Michigan Supreme Court in *Woodward* on the controlling issue of state law.

It is inconsistent with the sound administration of justice for a United States Court of Appeals to insist on deciding a state law question there is no need for it to decide.

Its action in doing so in this case could easily lead to the perpetuation of "injustices from inconsistent federal and state interpretations of state law" to which this Court adverted in *Vandenbark.*

Immediately upon the issuance of the opinion of the Supreme Court of Michigan in *Woodward,* Bannert will promptly transmit the requisite number of copies to this Court.

WHEREFORE, Petitioner Robert C. Bannert respectfully requests this honorable Court to grant Bannert's Petition For Certioriari and summarily reverse and remand this case to the Court of Appeals with directions to

hold decision in this case in abeyance pending the issuance of the decision of the Michigan Supreme Court on the controling issue of state law.

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APPENDIX

IN THE

District Court of the United States

For the Eastern District of Michigan
Southern Division

Robert C. Bannert,
Plaintiff,
v
American Can Company,
Defendant.

No. 39762

MEMORANDUM OPINION AND ORDER

(Filed May 23, 1974)

This is a suit by Robert C. Bannert against the American Can Company to require the Can Company to pay him the monthly pension payments from January 1, 1972, to date, to direct that the payments be continued so long as the plaintiff lives and to further direct the defendant to pay death benefits provided for in Section VII(2) of the Plan at the time of decedent's death.

Plaintiff had been an employee of the defendant since 1950. At the time of his retirement, August 1, 1971, he was the General Manager of the can manufacturing operations of three (3) American Can Company plants. At that time he was fifty-six (56) years of age. His retirement was voluntary and was classified as early retirement under the terms of the pension plan.

The Plan provided for payment to the plaintiff from the date of retirement of $435.60 per month, of which $96.63 was a result of his own contribution and $338.97 as a re-

sult of contributions by the defendant. It also provided additional benefits on death in Section VII(2).

Section XII of the Plan provides in pertinent part:

> "If the Annuity Board finds that any retired disabled or former Member is engaged or employed in any occupration or in a business which in its opinion is in competition with American Can Company or any Subsidiary and after due notice such member continues to be so engaged or employed, the Annuity Board may suspend or terminate any right or claim of any such Member of his provisional payee to or in respect of any retirement or other benefit under the Plan except to the extent that the same may be provided by such Member's own contributions under the Plan and the Prior Plans plus Credited Interest to the date of his retirement or termination of his employment and except benefits payable under the Metropolitan Contract or the Equitable Contract; in exercising its discretion under this sentence, the Annuity Board shall not discriminate in favor of the group composed of Members who, during employment by the Company, were officers, shareholders, persons whose principal duties consisted in supervising the work of other employees, or highly compensated employees. The acceptance by a retired, disabled or former Member of any benefit under the Plan shall constitute a representation by such Member that he is not engaged or employed in any such competitive occupation or business. The Annuity Board may require each Member eligible for a retirement or disability benefit under the Plan to acknowledge in writing prior to payment of any

> such benefit that he will accept payment of benefits under the Plan only upon the condition herein above prescribed."

Section XI of the Plan provides in pertinent part:

> "The Plan shall be administered by an Annuity Board, the members of which shall be appointed from time to time by the Board.
>
> "The Annuity Board shall have the exclusive right to interpret the terms and provisions of the Plan and to determine any and all matters and questions arising thereunder or in connection with the administration thereof, including without limitation the right to remedy possible ambiguities, inconsistenices or omissions. All interpretations, determinations and decisions of the Anuity Board in respect of any matter or question arising under the Plan shall be final, conclusive and binding for all purposes upon all Employees, Members, provisional payees and beneficiaries. The Annuity Board, from time to time, may establish rules for the administration of the Plan and the transaction of the Annuity Board's business."

In this case the plaintiff accepted a position as Manager —Can Fabrication Operation with Pepsico, Inc., at the time of his retirement from the American Can Company, and he has been working since that time for Pepsico, Inc., in that capacity.

The Annuity Board for the American Can Company, on September 27, 1971, terminated the plaintiff's benefits paid for by the Can Company as of January 1, 1972, because of "Mr. Bannert's affiliation with Pepsico, Inc. He is engaged

or employed in an occupation or business which in the opinion of the Annuity Board is in competition with American Can Company." At a subsequent meeting on December 17, 1971, the Annuity Board "reaffirmed the decision made at the September 27, 1971 meeting." Since January 1, 1972, the plaintiff has been paid only $96.63 a month, the amount due him as a result of his own contributions.

The first issue in the case is whether the plaintiff in his work with Pepsico "is engaged or employed in any occupation or business . . . in competition with American Can Company" and whether the Annuity Board correctly exercised its authority, under Section XI of the Plan, in determining this question.

The plaintiff contends he is not in competition.

The facts indicate the plaintiff was the General Manager of the can manufacturing operations of three (3) American Can Company plants at the time of his retirement. Pepsico desired to establish a can manufacturing operation to study the feasibility of can manufacturing and to monitor can costs. They employed Bannert after their plans for a plant at Howell, Michigan, were virtually complete, to purchase equipment, set up the plant and to get it in operation. He did so.

Pepsico does not sell cans in the open market. Instead, they use cans in their soft drink business in lieu of cans bought in the open market and sell cans to their subsidiary franchised bottlers for this purpose.

The court finds these facts indicate that Bannert, while employed by Pepsico, was the Manager of the Can Fabrication Operations and was engaged in and employed in an occupation and business in competition with the American Can Company. Thus, the findings by the Annuity Board are fully supported on this issue.

As to the decision of the Annuity Board, the court is guided by the standards set forth in *Hainline v. General Motors Corp.*, 444 F.2d 1250, 1258 (6th Cir. 1971), when, in a similar case, the Court of Appeals for this Circuit said that the issue before the court was whether the board "exercised good faith judgment on reasonable grounds or indulged in an arbitrary use of power".

The record indicates, on the issue of competition, that the board, in this case, exercised "good faith judgment on reasonable grounds" and did not "indulge in an arbitrary use of power".

The second issue is whether the board acted in an arbitrary manner in terminating the monthly payments to the plaintiff. The plaintiff claims the power to terminate is an illegal restraint on the plaintiff, the the provision is against public policy and, alternatively, that the board did not consider merely "suspending" payments during the term of plaintiff's employment or, if it did, its action in "terminating" and not "suspending" the payments, was "an arbitrary use of power."

The terms of the contract empower the board to either "suspend" or "terminate" the rights or claims. These are quite different terms. "Suspend" indicates a temporary discontinuance of benefits, while "terminate" suggests a permanent cessation of rights under the contract. The use of the two terms suggests that it was intended in some instances that persons who are in competition with the American Can Company be suspended, and in some instances that they be terminated. The board had the obligation to draw a line and distinguish cases that should be terminated from those that should be merely suspended. The evidence in this case, however, indicates that all persons found to be in competition have been terminated and the minutes of

the board hearings do not indicate that suspension was ever considered as a possible alternative.

The terms of the provisions found in Section XIII indicate that "suspension" was intended to be the primary word of the two. The present tense is used throughout the section in connection with competing employment. "If the . . . is engaged" the board may suspend or terminate or "acceptance of a benefit shall not constitute representation that he is not engaged."

If "terminate" was intended to be the primary policy, would not the provision have also included the past tense "is or has been engaged"?

In this matter it seems to the court that the board did not act in good faith judgment on reasonable grounds, but indulged in an arbitrary use of power. *Hainline v. General Motors Corp.*, 444 F.2d 1250, 1258 (6th Cir. 1971).

There is no evidence in this case that the plaintiff had or used any trade secrets. Three to four hundred people in the country had information and skill equal to that of the plaintiff. All can manufacturing operations proceed with the same basic knowledge and from the same basic premises as that of American Can and are managed by persons of skill comparable to that of the plaintiff. The machinery and knowledge used by the plaintiff in setting up and beginning operations of the Pepsico can manufacturing operations and by him in his position as manager of the Pepsico can manufacturing operations was know to the industry generally. He did not use machinery and knowledge unknown to the industry. In fact, counsel for the defendant conceded in open court there was nothing in this case relating to the abuse of any of defendant's private information or secrets, etc. If there had been such abuse in this case perhaps that would lead the board, in

the first instance, to terminate the rights under the contract rather than merely suspend, but this is not the case.

There is substantial authority in the country challenging the validity of forfeiture provisions in pension plans for one or more reasons. The primary reason is the serious limitations on mobility and the right to work placed upon one employed where there are such plans. This is an increasingly important problem as persons retire earlier and earlier, and are limited by these provisions in the work they can do to support themselves because of the threat of full forfeiture of pension rights.

The Plan of the American Can Company to provide pensions for its employees seems on its face to speak to this issue by providing either for "suspension" or "termination" of the pension claims. The Plan permits a line to be drawn between cases where, on the one hand the interests of the employee prevail and, on the other hand where the company has vested the employee with many trade secrets, etc., and the interests of the employer should prevail.

The appropriate method for examining questions of the vaildity of provisions of this kind is to balance the interests of the respective parties to determine their respective needs and whether or not a particular provision is unconscionable. *Van Hosen v. Bankers Trust Co.*, (Iowa) 200 N.W. 2d 504, 508-509 (1972); Levin, *Non compete Clauses, Pension & Welfare News*, 76 (1973).

It has been held in Michigan, in *Couch v. Difco*, that a forfeiture provision of rights under a pension agreement against competing for one year is not an agreement not to compete, which has been declared by the statutes of this state to be against public policy. M.C.L.A. 445.761; *Couch v. Difco*, 44 Mich App 44, 205 N.W. 2d 25 (1972). This case, however, expressly reserved the issue of the "reason-

ableness of the restraint" because *Couch* had not contended that the provision "constitutes an unreasonable or unconscionable restraint". *Couch, supra,* at 49-50.

The following cases have sustained forfeiture in such situations.

Van Pelt v. Berefco, Inc., 60 Lll. App. 2d 415, 208 N.E. 2d 858 (1965); *Application of Kumm,* 36 Misc. 2d 816, 233 N.Y.S. 2d 598 (1962); *Kristt v. Whelan,* 4 App. Div. 2d 195, 164 N.Y.S. 2d 239, *aff'd,* 5 N.Y. 2d 807, N.Y.S. 2d 205, 155 N.E. 2d 116 (1957); *Jacobus v. Massachustetts Mutual Life Ins. Co.,* 91 F. Supp. 674 (D.C.N.Y. 1950); *Neuffer v. Bakery & Confectionery Workers Inter. Union;* 307 F. 2d 671 (D.C. Cir. 1962); *Kidd v. Oakes,* 39 Misc. 2d 645, 241 N.Y.S. 2d 403 (1963); *Garner v. Girard Trust Bank, et al.,* 442 Pa. 166, 275 A. 2d 359 (1971); *Flynn v. Murphy, et al.,* 350 Mass. 352, 215 N.E. 2d 109 (1966).

The following cases have refused to enforce forfeiture in situations of this kind.

Muggill v. Reuben H. Donnelley Corp., 62 Cal. 2d 239, 42 Cal. Rptr. 107, 398 P. 2d 147 (1965); *Ulmann v. Sunset-McKee Co.,* 221 F. 2d 128 (9th Cir. 1955); *Wyatt v. Kreglinger, et al.,* 1 KB 793 (1933); *Van Hosen v. Bankers Trust Co.,* 200 N.W. 2d 504 (Iowa 1972); *Food Fair Stores, Inc. v. Greeley,* 264 Md. 105, 285 A. 2d 632 (1972); *Flammer v. Patton,* 245 So. 2d 854 (Fla. 1971); *Rochester v. Rochester Corp.,* 316 F. Supp. 139 (E.D. Va. 1970); *Mackie v. State Farm Mut. Auto. Ins. Co.,* 13 Mich. App. 556, 164 N.W. 2d 777 (1968).

It seems to this court that it is reasonable to suspend payments during the period of competition but in the absence of a showing before the Annuity Board of some special hardship to the Can Company, a showing absent from the minutes of the board in this case and one not

supported by any evidence produced in court, termination of payments resulting in the permanent forfeiture of the person's right under the pension agreement would be unconscionable.

Since the plaintiff has been in competition with the defendant from the time of termination to date, the plaintiff is entitled to take nothing to the present time. When the plaintiff ceases to be "engaged or employed in an occupation or in a business" in competition with the American Can Company, the company is directed to reinstate the pension and to pay other benefits provided by the Plan.

This matter is not remanded to the pension board for determination of any matters relating to "suspension" or "termination", on the same theory the Court of Appeals in *Hainline* refused to permit the pension board to make any further determination, because further consideration by the committee of this issue would not "afford the [plaintiff] an efficacious remedy". *Hainline v. General Motors Corp.,* 444 F. 2d at 1258, n. 5.

Counsel are directed to prepare and submit a judgment entry in accordance with this Memorandum Opinion and Order and award costs to the plaintiff.

So ordered.

/s/ Charles W. Joiner
United States District Judge

Dated: May 23, 1974
Detroit, Michigan

United States District Court
Eastern District of Michigan
Southern Division

Robert C. Bannert,
Plaintiff,
v
American Can Company,
Defendant.
No. 39762

JUDGMENT

(Filed July 17, 1974)

In accordance with the Memorandum Opinion and Order issued by this Court on May 23, 1974, it is the judgment of this Court that when Robert C. Bannert ["Bannert"] ceases to be engaged or employed in an occupation or business in competition with American Can Company ["American Can"], American Can will fully reinstate Bannert's pension and Bannert's other rights and benefits under the American Can Retirement Plan For Salaried Employees.

Charles W. Joiner
United States District Judge

APPROVED: 7/17/74

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Appeal From The United States District Court For The
Eastern District of Michigan
Southern Division

Robert C. Bannert,
Plaintiff-Appellee,
—vs—
American Can Company,
Defendant-Appellant.
No. 74 2365

MOTION FOR EXTENSION OF THE TIME FOR FILING PLAINTIFF-APPELLEE'S BRIEF AND FOR A DEFERRAL OF THE ORAL ARGUMENT

(Filed March 18, 1975)

Unconscionability is one of the grounds of the District Court's decision:

> "[I]n the absence of a showing before the Annuity Board (of Defendant-Appellant American Can Company ["the Can Company"]) of some special hardship to the Can Company, a showing absent from the Minutes of the board in this case and one not supported by any evidence produced in court, termination of payments resulting in the permanent forfeiture of ["Bannert's"] right under the pension agreement would be unconscionable." [Appendix, Page 24a].

The Supreme Court of Michigan has agreed to decide substantially the same question of law in *Woodward, et al. v. Cadillac Overall Supply Co.*, leave to appeal granted at 392 Mich 808 (1974), specifically the

> "[l]egality of a provision of an employee's retirement plan requiring forfeiture of benefits if an employee goes to work for a competitor."

53 Mich State Bar Journal, 735 (November, 1974) [describing the issue presented in the application for leave to appeal in *Woodward, supra.*]

On March 12, 1975, the Clerk of the Michigan Supreme Court [Harold H. Hogue] advised counsel for Plaintiff-Appellee Robert C. Bannert ["Bannert"] that, barring unforeseen future developments, there is a 99% chance that *Woodward v Cadillac Overall Supply Company* will be orally argued and submited for decision by the Supreme Court in June, 1975.

Counsel for American Can have consented to an extension of the time for the filing of Bannert's Brief from March 12, 1975 [the first due date] to April 2, 1975.

Bannert respectfully requests this Honorable Court

1) to extend the time for filing of Plaintiff-Appellee's Brief until thirty (30) days after the issuance of the Opinion of the Supreme Court of Michigan in *Woodward v. Cadillac Overall Supply Company,* 392 Mich 808 (1974) [leave to appeal granted] and to defer the oral argument on this appeal until a

subsequent date convenient to this Honorable Court,

and, alternatively,

2) to extend the time for filing Plaintiff-Appellee's Brief until April 2, 1975.

Respectfully submitted,

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Denied,
/s/ Lively, J.
Circuit Judge

Extension to 4-7-75 granted
/s/ J. P. Herman
Clerk

No. 74-2365

UNITED STATES COURT OF APPEALS
for the Sixth Circuit

Robert C. Bannert,
Plaintiff-Appellee,
v.
American Can Company,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Michigan, Southern Division.

Decided and Filed October 23, 1975.

Before: Lively and Engel, Circuit Judges, and Cecil, Senior Circuit Judge.

Engel, Circuit Judge. Plaintiff Robert C. Bannert Brought suit again defendant American Can Company, seeking relief from the action of the Can Company's Annuity Board permanently terminating his rights to the portion of his retirement benefits contributed by the Can Company. The Annuity Board had terminated the benefits because, upon his voluntary retirement, Bannert had accepted employment with a competitor.

The case, originally brought in the Circuit Court of Wayne County, Michigan, was removed to the district court on the basis of diversity of citizenship. After trial to the court, the district judge entered judgment for plaintiff, determining that Bannert should be fully reinstated under the Can Company's retirement plan whenever he ceased

to be engaged or employed with a competitor of the Can Company. The district judge posited two grounds for his decision. First, he found the action of the Annuity Board in fully terminating Bannert's pension benefits instead of merely suspedning them was an arbitrary use of power. Second, he held that under Michigan law a permanent forfeiture of Bannert's retirement benefits would be unconscionable.

We reverse. We hold that the district court finding that the Annuity Board's action was arbitrary is clearly erroneous, and further that the district judge misinterpreted Michigan law in holding that action to be unconscionable.

The salient facts are set out in the district judge's opinion filed May 23, 1974.

Plaintiff had been an employee of the defendant since 1950. At the time of his retirement, August 1, 1971, he was the General Manager of the can manufacturing operations of three (3) American Can Company plants. At that time he was fifty-six (56) years of age. His retirement was voluntary and was classified as early retirement under the terms of the pension plan.

The Plan provided for payment to the plaintiff from the date of retirement of $435.60 per month, of which $96.63 was a result of his own contribution and $338.97 as a result of contributions by the defendant. It also provided additional benefits on death in Section VII(2).

Section XII of the Plan provides in pertinent part:

> "If the Annuity Board finds that any retired disabled or former Member is engaged or employed in any occupation or in a business which

in its opinion is in competition with American Can Company or any Subsidiary and after due notice such member continues to be so engaged or employed, the Annuity Board may suspend or terminate any right or claim of any such Member or his provisional payee to or in respect of any retirement or other benefit under the Plan except to the extent that the same may be provided by such Member's own contributions under the Plan and the Prior Plans plus Credited Interest to the date of his retirement or termination of his employment and except benefits payable under the Metropolitan Contract or the Equitable Contract; in exercising its discretion under this sentence, the Annuity Board shall not discriminate in favor of the group composed of Members who, during employment by the Company, were officers, shareholders, persons whose principal duties consisted in supervising the work of other employees, or highly compensated employees. The acceptance by a retired, disabled or former Member of any benefit under the Plan shall constitute a represetnation by such Member that he is not engaged or employed in any such competitive occupation or business. The Annuity Board may require each Member eligible for a retirement or disability benefit under the Plan to acknowledge in writing prior to payment of any such benefit that he will accept payment of benefits under the Plan only upon the condition herein above prescribed."

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"The Plan shall be administered by an Annuity Board, the members of which shall be appointed from time to time by the Board.

"The Annuity Board shall have the exclusive right to interpret the terms and provisions of the Plan and to determine any and all matters and questions arising thereunder or in connection with the administration thereof, including without limitation the right to remedy possible ambiguities, inconsistencies or omissions. All interpretations, determinations and decisions of the Annuity Board in respect of any matter or question arising under the Plan shall be final, conclusive and binding for all purposes upon all Employees, Members, provisional payees and beneficiaries. The Annuity Board, from time to time, may establish rules for the administration of the Plan and the transetion of the Annuity Board's business."

In this case the plaintiff accepted a position as Manager—Can Fabrication Operation with Pepsico, Inc., at the time of his retirement from the American Can Company, and he has been working since that time for Pepsico, Inc., in that capacity.

The Annuity Board for American Can Company, on September 27, 1971, terminated the plaintiff's benefits paid for by the Can Company as of January 1, 1972 because of "Mr. Bannert's affiliation with Pepsico, Inc. He is engaged or employed in an occupation or business which in the opinion of the Annuity Board is in competition with American Can Company." At a subsequent meeting on December 17, 1971, the Annuity Board "reaffirmed the decision made at the September 27, 1971 meeting". Since January 1, 1972, the plaintiff has been paid only $96.63 a month, the amount due him as a result of his own contributions.

Upon the foregoing facts, the district judge found that Bannert, by accepting employment with Pepsico, Inc., was engaged in an occupation and business in competition with American Can Company. This finding is not disputed on appeal. Nevertheless, the district judge held that a second issue was whether the Board acted in an arbitrary manner in terminating the monthly payments to plaintiff, rather than merely suspending them for the period of Bannert's employment with a competitor.

Since Section XII of the Pension Plan provided that the Board could "suspend or terminate any right or claim of any such Member . . .", the district judge concluded that the Board had an obligation to draw a line and distinguish cases where benefits should be terminated from those where they should be merely suspended. Because the evidence showed the Board had never considered the option of suspention as a possible alternative in Bannert's case, the district court found the Board's action to be an arbitrary use of power, especially in the absence of any showing that, while Bannert was employed by Pepsico, he had abused any evidence or revealed any trade secrets:

> In this matter it seems to the court that the board did not act in good faith judgment on reasonable grounds, but indulged in an arbitrary of power. *Hailine* v. *General Motors Corp.*, 444 F. 2d 1250, 1258 (6th Cir. 1971).

Hainline v. *General Motors Corp., supra,* a former General Motors employee brought suit to recover installments of General Motors stock cash awarded to him as bonuses during his employment pursuant to the General Motors Bonus Plan. Hailine had resigned his job because his

daughter's delicate health required that he relocate his family in a warmer climate. The committee which administered the Bonus Plan decided that plaintiff was not entitled to receive any further disbursements of accumulated bonus cash or stock. The district court entered summary judgment for defendant. This court reversed, holding that there was a genuine issue of fact as to whether the committee, in denying plaintiff bonus awards under the plan, exercised a good faith judgment on reasonable grounds or indulged in an arbitrary use of its power. The plan gave the committee "absolute discretion" to determine who was eligible under the plan to receive bonus awards. In responding to the defendant's contention that this provision made the committee's decision conclusive, Judge Miller observed:

> In general, the power to exercise discretion is not the power to act arbitrarily, discretion may not be abused by those to whom it is entrusted, and this fact holds true no less in the private than in the public sector. While courts should be wary of interfering with the judgment of corporate executives, it has been held that such judgment cannot stand if fraud or bad faith was shown.
>
> 444 F. 2d at 1255 (citation omitted)

Hainline quoted with approval the language used by the court in *Siegel* v. *First Pennsylvania Banking and Trust Co.*, 201 F. Supp. 664 (E.D. Pa. 1961), wherein the court stated that the applicable standard of review of the committee's decision was whether the committee was guilty of "fraud or such gross mistakes as imply bad faith or failure to exercise an honest judgment". 201 F. Supp. at 669.

Given this very restrictive standard of review of the Annuity Board's decision, we conclude that the district court

finding that the Board's action here was an arbitrary use of power is clearly erroneous. There was no evidence that the Board's action was based upon any personal malice or ill will toward Bannert, nor was there evidence of bad faith or fraud. The crux of the judge's decision is found in this paragraph of his opinion:

> The terms of the contract empower the board to either "suspend" or "terminate" the rights or claims. These are quite different terms. "Suspend" indicates a temporary discontinuance of benefits, while "terminate" suggests a permanent cessation of rights under the contract. The use of the two terms suggests that it was intended in some instances that persons who are in competition with the American Can Company be suspended, and in some instances that they be terminated. The board had the obligation to draw a line and distinguish cases that should be terminated from those that should be merely suspended. The evidence in this case, however, indicates that all persons found to be in competition have been terminated and the minutes of the board hearings do not indicate that suspension was ever considered as a possible alternative.[1]

We cannot agree with the district court that the fact the Annuity Board follows a policy of terminating pension benefits, rather than merely suspending them, when an employee

[1] The district court conclusion that the Annuity Board never considered the option of suspension is not entiretly correct. The Board's policy was to suspend benefits for a 90-day period and allow the former employee to sever his connections with the Can Company's competitor. Only if this did not occur were the benefits permanently terminated. The district court was correct in concluding, however, that the Board never deviated from its policy of termination of benefits after the 90-day grace period in cases of voluntarily retiring employees such as Bannert.

voluntarily retires and goes to work for a competitor, is evidence of arbitrary action by the Board. As noted by the district court, the plan gives the Board option of terminnating or suspending benefits. However, we do not think that this fact precluded the Board from adopting a policy of termination where an employee who *vountarily* retires goes to work for a competitor. As noted by appellants, mere suspension of benefits would provide no incentive for an employee like Bannert, who had many productive years left before normal retirement, to remain at American Can rather than retiring voluntarily and joining a competitor. Were Bannert to remain with American Can, he would have continued to receive his salary until retirement and would then receive full retirement benefits. On the other hand, if Bannert were to voluntarily retire and join a competitor, he would receive his salary from the competitor until normal retirement, and then would receive his full pension from American Can. In short, Bannert would lose nothing by retiring voluntarily and joining a competitor.

In finding the Board to have acted arbitrarily, the district court deemed important the fact that there was no evidence showing Bannert had divulged any trade secrets or abused any confidence reposed in him by the Can Company. This fact might be persuasive were we to conclude that the only purpose of the forfeiture provision was to prevent key employees from going to work for a competitor. However, as argued by appellants, a central purpose of the retirement plan was to encourage employees to stay with the Can Company until normal retirement age.[2] Such a

[2] Of course, Bannert could have retired voluntarily and, had he not gone to work for a competitor, would have received "Early Retirement" benefits as provided by Section V of the Plan. In Bannert's case, these benefits would be considerably less than the benefits he would receive upon "Normal Retirement" at age 65. We think that this illustrates that a purpose of the Retirement Plan was to encourage employees to remain with the Can Company until normal retirement age.

purpose is not effectuated any time an employee leaves before the normal retirement age, irrespective of whether or not he divulges trade secrets to his new employer. Thus, we cannot agree that the failure of the Annuity Board to consider whether Bannert had breached any confidence before deciding to terminate his benefits rendered its decision arbitrary.[3]

We do not decide whether the policy of always terminating benefits when an employee voluntarily retires as adopted by the Board is necessarily a wise or prudent one. But, as noted in *Hainline, supra,* such a judgment of the Board can only be overturned if the Board was guilty of fraud or such gross mistakes as to imply bad faith or a failure to exercise an honest judgment.[4] In view of what we conceive to be cogent reasons for the adoption of a uniform policy with respect to voluntarily retiring employees, and the lack of any evidence that the Annuity Board acted in bad faith, we must conclude that the district court holding that the Board's action was arbitrary is clearly erroneous.

[3] It is difficult to see, in any event, how the Annuity Board would be able to determine, at the time it made its decision, whether any trade secrets had been divulged or confidences breached by Bannert since he had left his position with the Can Company only a few months prior thereto.

[4] We do not believe that the fact that the Board made its decision in Bannert's case pursuant to an established policy rather than on an individualized basis indicates that its members failed to make an "honest judgment". The record indicates the Board had before it all the facts relevant to Bannert's case when it rendered its decision and, as we have noted earlier, we believe there were cogent reasons for deciding claims pursuant to an established policy rather than on an individualized basis.

The second basis for the district court's decision was its holding that under Michigan law,[5] the permanent forfeiture of benefits was unconscionable:

> It seems to this court that it is reasonable to supend payments during the period of competition but in the absence of a showing before the Annuity Board of some special hardship to the Can Company, a showing absent from the minutes of the board in this case and one not supported by any evidence produced in court, termination of payments resulting in the permanent forfeiture of the person's right under the pension agreement would be unconscionable.

Under M.C.L.A. 445.761, M.S.A. 28.61, all agreements and contracts by which any person "promises or agrees not to engage in any avocation, employment, pursuit, trade, profession or business, whether reasonable or unreasonable . . . are hereby declared to be against public policy an illegal and void." In *Couch* v. *Administrative Committee of Difco Laboratories Incorporated Salaried Employees Profit Sharing Trust,* 44 Mich. App. 44, 205 N.W. 2d 24 (Mich. Ct. App. 1972), the Michigan Court of Appeals held that the cited statute did not itself bar a forfeiture clause in a pension plan which terminated benefits, should the employee engage in competitive employment. In so ruling, Judge Levin cited with approval language from the decision of the Fourth Circuit in *Rochester Corporation* v. *Rochester,* 450 F. 2d 118, 122-123:

> "The strong weight of authority holds that forfeitures for engaging in subsequent competitive

[5] Michigan law was applied by the district judge and neither party on appeal has argued that any other law should be applied.

> employment, including in pension retirement plans, are valid, even though unrestricted in time or geography. The reasoning behind this conclusion is that the forefeiture, unlike the restraint included in the employment contract, is not a prohibition on the employee's engaging in competitive work but is merely a denial of the right to participate in the retirement plan if he does so engage." (Footnote omitted)

Judge Levin then went on to observe.

> Just as an employee has a recognizable interest in protecting his accrued benefits under a retirement plan, so too an employer has an interest in discouraging his employees from going to work for a competitor. Until the Legislature makes some effort to reconcile and balance these competing interests, the court will, as they have with so many other questions, attempt to strike an appropriate balance between the claims of employees who have built an equity under a retirement plan after many years of service and the claims of employers seeking to discourage employees possessing valuable know-how from accepting employment with their competitors.
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> 205 N.W. 2d at 27.

The issue of reasonableness of the restraint or whether it was unconscionable was not before the court in *Couch, supra,* because the plaintiff had not raised it. The court's citation of the above quoted language from *Rochester Corp.* v. *Rochester, supra,* indicates, however, that the court felt that the prevailing weight of authority was to the effect that such forfeiture provisions in retirement plans are not

unreasonable. Further, the court cited on the question of reasonableness of the restraint the earlier opinion of the Michigan Court of Appeals in *Tobin* v. *General Motors Corp.,* 17 Mich. App. 475, 169 N.W. 2d 644 (1969). In *Tobin,* the court had before it the question of the validity of the same sections of the General Motors Bonus Plan involved in *Hainline, supra.* Plaintiff, a former employee of General Motors had voluntarily retired and gone to work for a competitor. The Bonus and Salary Committee determined that plaintiff had lost his right to receive unpaid bonus awards and undelivered stock credits. Plaintiff sued for recovery of such amounts, and G-M moved for summary judgment which the district court granted. The question on appeal, as stated by the Court of Appeals, was whether the provisions of the plan calling for forfeiture of the accumulated bonus awards and stock options were "illegal and/or void". 169 N.W. 2d at 647. In concluding that such a provision was not illegal or void, the court cited with approval *O'Madigan* v. *General Motors Corp.,* 202 F.Supp. 190 (E.D. Mo. 1961), *aff'd* 312 F.2d 250 (8th Cir., 1963), also involving the forfeiture provisions of the General Motors Bonus and Salary Plan. The district court in *O'Madigan* had granted summary judgment for defendant against a claim that the Committee had wrongfully forfeited plaintiff's benefits. In affirming, the Court of Appeals stated:

> Having analyzed the bonus plan under which the awards were made, having examined the record and briefs of the parties and the authorities upon which they rely, and having carefully reviewed other pertinent authorities, we are satisfied that paragraph 8 (a) of the bonus plan is valid and, for the reasons stated in Judge Weber's opinion with which we are in full accord, we affirm.
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> 312 F.2d at 251.

The Michigan Court of Appeals' summary rejection in *Tobin* of the claim that the forfeiture provisions of the General Motors Bonus Plan were "illegal and/or void" and its recognition in *Couch, supra,* of the employer's interest in retaining key employees and discouraging them from going to work for a competitior lead us to conclude that the Michigan courts would not find forfeiture unconscionable or unreasonable here. This is particularly so where an employee voluntarily resigns and accepts employment with a competitor since, as we have noted earlier, a suspension of benefits will not effectuate a central purpose of the plan, to induce employees to remain with the corporation.[6]

At oral argument, it was suggested that the result in this case might be affected by the passage of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001, *et seq.* Accordingly, we requested and received supplemental briefs discussing the possible impact of this federal statute upon the facts presented here. Upon reflection, however, we conclude that we should not pass upon this issue since it was not raised in the district court, *Hormel* v. *Helvering,* 312 U.S. 552, 556 (1941), *Schneider* v. *Electric Auto-Lite Company,* 456 F.2d 366, 375 (6th Cir. 1972).

The judgment of the district Court is reversed and remanded for entry of judgment for defendant. Costs awarded to appellants.

[6] We are aware that the same issue herein presented is pending before the Michigan Supreme Court in *Woodward et al.* v. *Cadillac Overall Supply Co.,* No. 56015, argued June 4, 1975. The issue presented for review therein, as stated in the Michigan State Bar Journal, Vol. 53, 735, is: "Legality of a provision of an employee's retirement plan forefeiture of benefits if an employee goes to work for a competitor."

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Robert C. Bannert, Plaintiff-Appellee, v American Can Company, Defendant-Appellant.	No. 74-2365

ORDER

(Filed January 14, 1976)

Before: Lively and Engel, Circuit Judges, and Cecil Senior Circuit Judge.

No judge in regular active service of the court having requested a vote on the suggestion for a rehearing *en banc,* the petition for rehearing filed herein by the plaintiff-appellee has been referred to the panel which heard the original appeal. Upon consideration of said petition, the court concludes that it is without merit.

Accordingly, the petition for rehearing is hereby denied.

Entered by Order of the Court

/s/ John P. Hehman
Clerk